No. 11,656

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

RENALDO FERRARI,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

OPENING BRIEF FOR APPELLANT.

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Renaldo Ferrari, in an indictment naming sixteen co-defendants, was charged with the crime of concealing and facilitating the concealment of a derivative and preparation of morphine, to wit, heroin (21 U.S.C.A., Section 174) and for the crime of conspiracy (18 U.S.C.A., Section 88). After a waiver of trial by jury (R. 40), the defendant was granted a separate trial (R. 41). The government then moved to dismiss the conspiracy charge and all counts of the indictment save Counts One, Thirty-nine and Forty, charging concealment and facilitation of concealment of heroin, and Ferrari was convicted and sentenced to one day's imprisonment and fined $1.00 on Count One of the indictment, and convicted and sentenced to three years and fined $100.00 on each of Counts Thirty-nine and Forty of the indictment.

The appellant prosecutes this appeal contending that the evidence was insufficient as a matter of law to sustain the judgment, that there was a variance between the offense charged in Count One of the indictment and the evidence offered to sustain the charge, and that he did not receive a fair trial.

JURISDICTIONAL STATEMENT.

The statutory provisions which sustain the jurisdiction of the court are as follows:

(1) The jurisdiction of the District Court, 28 U.S.C.A., Section 41, subdivision 2. This section provides that the District Courts shall have original jurisdiction of

> "all crimes and offenses cognizable under the authority of the United States."

(2) The jurisdiction of this court upon appeal to review the judgment in question. 28 U.S.C.A., Section 225, provides:

> "The Circuit Courts of Appeals shall have appellate jurisdiction to review by appeal final decisions—first in the District Court in all cases save wherein a direct review of the question may be had in the Supreme Court under Section 345 of this title."

(3) The pleadings necessary to show the existence of jurisdiction:

The indictment (R. 2-33);
Plea of "not guilty" (R. 39);
Notice of Appeal (R. 47).

STATEMENT OF THE CASE, PRESENTING THE QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED.

The indictment (R. 2-33) reads in part as follows:

"First Count

(Jones-Miller Act, 21 U.S.C., Section 174)

"The Grand Jury charges: That Vincent Bruno and Renaldo Ferrari, on or about the 5th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew."

Count Thirty-nine of the indictment charges that Frank Flier and Renaldo Ferrari, on or about the 17th day of January, 1946, did conceal and facilitate the concealment of one dram of heroin, and Count Forty charges that Vincent Bruno, Frank Flier and Renaldo Ferrari, on or about the 28th day of January, 1946, did conceal and facilitate the concealment of approximately one dram of heroin. Both counts further charge that said concealment was in violation of 21 U. S. C., Section 174.

Count Fifty-five of the indictment charges that the same offense was committed on or about February 21, 1946 by Vincent Bruno, Frank Flier, Salvatore Billeci, Renaldo Ferrari and Samuel Louis Cohen.

Count Fifty-six of the indictment charges that the defendants named in the caption, including appellant, did conspire together to receive, conceal, buy, sell and facilitate the transportation and concealment of heroin in violation of Section 174, Title 21, U. S. Code. The crime here charged is a conspiracy under 18 U. S. C., Section 88.

Counsel for appellant made a motion for a bill of particulars (R. 35) and a motion to dismiss the indictment (R. 36). Both motions were denied (R. 39). Appellant filed a written waiver of trial by jury (R. 40). Appellant made a motion for severance of trial and this motion was granted (R. 41).

Appellant's trial began before the Honorable Louis E. Goodman, District Judge, April 23, 1947. The government moved to dismiss all counts of the indictment as to the defendant Ferrari, other than Counts One, Thirty-nine and Forty (R. 51) and all of said counts save Counts One, Thirty-nine and Forty were dismissed by the trial court (R. 42).

Count One of the indictment reads as follows:

> "The Grand Jury charges that Vincent Bruno and Renaldo Ferrari, on or about the 5th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew." (R. 2.)

The government called as its first witness G. E. Mallory, who identified as containing heroin three envelopes subsequently alleged by witnesses called by the government to have been removed from the Star Dust Bar, 1098 Sutter Street, in the City and County of San Francisco, on January 5, 1946, January 17, 1946 and January 18, 1946 (R. 54-58).

Thomas E. McGuire, a Federal Narcotics Agent, next called by the government (R. 58), testified that on January 5, 1946 he was concealed in the basement of an apartment house located on the northeast corner of Larkin and Sutter Streets, from which he could observe without being seen the contents of the liquor room of the Star Dust Bar. The witness testified that *Frank Flier entered the liquor room and removed a bindle from where it was hidden.* Flier then extracted some of the white substance from the bindle with a penknife and inhaled the substance into his nostrils. *A minute or two later Ferrari entered the liquor room* and Ferrari, the witness testified, then inhaled from the penknife. Ferrari handed back the package or bindle and the knife to Flier. *Flier then hid the bindle between three or four beer cases* (R. 63, 64). The witness testified that he could not see Ferrari come down the hall from the bar in the front of the Star Dust Bar to the liquor room.

The government then called Narcotics Agent William H. Grady (R. 69). Grady testified that on January 5, 1946, at or about the hour of 8:35 P.M., *he observed Flier enter the liquor room and close the door. Shortly thereafter Ferrari rapped on the door, Flier*

opened the door and Ferrari entered. Flier handed a penknife and bindle to Ferrari, who inhaled from the white substance on the penknife. Grady then changed his post and observed that *Ferrari then left the liquor room. A few seconds later Flier closed the door and joined Ferrari* and they walked together into the bar (R. 70, 71).

The Thirty-ninth Count of the indictment charges:

> "That Frank Flier and Renaldo Ferrari, on or about the 17th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew." (R. 20.)

Narcotics Agent McGuire testified that on January 17, 1946, at or about the hour of 11:30 P.M., *"prior to their entering into the liquor room"* (R. 67), *Flier withdrew the bindle from the place of concealment. Ferrari then used it* in the same manner in which he had on the first occasion; *Ferrari then handed the bindle back to Flier and "Flier again concealed it in the same place of concealment between the whiskey bottles,"* (R. 67).

The agent, Grady, testified that on January 17, 1946, at the same time and place, *Flier entered the liquor room first and reached down and removed the*

bindle from the place of concealment. Ferrari then entered, Flier used the contents, then Ferrari used the contents, then *"as they left, Flier returned the package to its hiding place"* (R. 72, 73).

Narcotics Agent Henry B. Hayes, next called by the government (R. 76), testified that on January 17, 1946 he observed *Flier remove the bindle from its hiding place,* Flier used the contents, Flier then passed the package to Ferrari, who used it. He further testified,

> "and then they left and as they left I saw Flier do the same thing before he closed the door and go under the empty beer cartons, moved and placed something there." (R. 76, 77).

Count Forty of the indictment charges:

> "That Vincent Bruno, Frank Flier and Renaldo Ferrari on or about the 28th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United State of America contrary to law, as said defendants then and there knew." (R. 21.)

Agent Grady testified that *Flier entered the liquor room; that Flier removed the bindle from the hiding place;* that Flier walked into the liquor room accompanied by Ferrari and Bruno. Flier then opened the

package and using a small knife inhaled from the contents. Bruno and Ferrari in that order inhaled.

> "Flier then refolded the package and placed the narcotics back in the hiding place." (R. 74).

At the conclusion of the government's case Mr. MacInnis made a motion to dismiss the First Count on the grounds of a fatal variance between the offense charged and the proof offered (R. 80). The motion was denied by the trial court (R. 83).

Mr. MacInnis then moved for a dismissal of all the charges, upon the ground that the government had not proved that Ferrari had "concealed or facilitated the concealment" of heroin (R. 84). The motion was denied by the court (R. 88).

The defense then put in its case (R. 88). The defense called witness Vincent Bruno (R. 98), who testified that he never saw Ferrari sniff heroin (R. 104) and on cross-examination specifically denied that he saw Ferrari use heroin on January 17 and January 28, and that Ferrari advised against its use (R. 104, 105).

It was stipulated that Salvatore Billeci would testify that he never saw Ferrari take any heroin (R. 107).

The witness Flier, called by the defense, testified that Ferrari never used heroin, that he did not see Ferrari use heroin on January 5, 1946 as charged, and that Ferrari advised against its use (R. 113). Appellant Ferrari was called by the defense (R. 115) and testified that he frequently went to the Star Dust

Bar to drink with his friends (R. 116). He further testified that photographs offered by the defense, taken in May, 1946, showed the position of bottles on the shelves in the liquor room of the Star Dust Bar in the same position that they were in in January and February, 1946 (R. 118). Ferrari further testified that on January 5, 1946 he was at Palm Springs, California (R. 119). His testimony was corroborated by a bill for horseback riding which he had received in a letter postmarked April 22, 1946 (R. 120). Ferrari denied inhaling heroin on January 17 or January 28, 1946, and denied that he is or at any time has been a user of narcotics (R. 124). He further denied that he used heroin in the Star Dust Bar January 5 or January 17 or January 28, 1946.

It was stipulated that the witness Henry Gourdine would testify that Ferrari rode horseback at Palm Springs January 6, 1946 (R. 128).

The government called in rebuttal Narcotics Agent Grady (R. 130), who testified that pictures taken by the defendants in May, 1946 did not represent conditions as they were in January, 1946 (R. 131), but on cross-examination he admitted that his view on those dates was obstructed (R. 134, 135).

The Agent Hayes, called in rebuttal (R. 138) and the Agent McGuire, called in rebuttal (R. 139) did in effect testify no more than that what they had hitherto testified to was the truth.

Mr. MacInnis renewed his motion to dismiss the First Count of the indictment, on the grounds of the

fatal variance between the charge and the proof offered (R. 140), and renewed his motion to dismiss all of the charges, on the grounds that the evidence failed to sustain the offenses charged (R. 140). The court found the defendant Ferrari guilty of all three counts upon which he was tried. Mr. MacInnis made a motion in arrest of judgment and renewed the motion for dismissal made at conclusion of the government's case in chief (R. 141). Mr. MacInnis made a motion for a new trial upon the grounds that the evidence was insufficient and upon all statutory grounds (R. 141), which was denied by the court (R. 142). The court then sentenced Ferrari to one day in jail and $1.00 in fine on Count One of the indictment and three years imprisonment in the federal penitentiary and $100.00 fine on Count Thirty-nine and three years imprisonment and $100.00 fine on Count Forty of the indictment, all of the sentences to run concurrently (R. 142).

SUPPLEMENTAL TRANSCRIPT OF RECORD.

Appellant was tried on the three counts noted on April 23 and April 24, 1947. On April 22, 1947 Frank Flier pleaded guilty before the Honorable Louis E. Goodman to a narcotics charge (Sup. R. 171). Subsequent to the plea of guilty, in proceedings to determine the sentence of Flier, the government agent, William Grady, testified that Renaldo Ferrari was "known to our office as (a) narcotic violator" (Sup. R. 172). The same agent also testified that Flier, Bruno and Ferrari divided money received from the

sale of narcotics (Sup. R. 181, 183). Counsel for Renaldo Ferrari was not present on these occasions and consequently was unable to cross-examine Mr. Grady.

The appellant, Ferrari, was tried in the instant proceedings on the following two days, before the Honorable Louis E. Goodman, but Mr. MacInnis did not learn of the testimony offered concerning Ferrari in the proceedings involving Flier until too late to initiate proceedings to disqualify Judge Goodman, or to argue the point on the motion for a new trial (R. 141).

Assignment of Error No. 1.

The court erred in denying appellant's motion to dismiss Count One of the indictment on the ground of fatal variance between the evidence offered and the offense charged (R. 83, 88).

Assignment of Error No. 2.

The court erred in denying appellant's motion to dismiss Count One at the conclusion of the trial (R. 140).

Assignment of Error No. 3.

The court erred in denying appellant's motion to dismiss all of the charges at the conclusion of the government's case on the ground that the offenses charged had not been proved (R. 84, 88).

Assignment of Error No. 4.

The court erred in denying appellant's motion to dismiss all of the charges after all of the evidence was

in, on the ground of insufficiency of the evidence (R. 141, 142).

Assignment of Error No. 5.

The court erred in denying appellant's motion in arrest of judgment (R. 141, 142).

Assignment of Error No. 6.

The court erred in denying appellant's motion for a new trial (R. 141, 142).

Assignment of Error No. 7.

The evidence was insufficient to establish the offenses charged in the indictment.

Assignment of Error No. 8.

The appellant was denied a fair trial.

ARGUMENT.

POINT 1. INSUFFICIENCY OF THE EVIDENCE.

Count 1 of the indictment charges that Bruno and Ferrari on the 5th day of January, 1946, fraudulently and knowingly did conceal and facilitate the concealment of a bindle of heroin. Count 39 charges that on the 17th of January, 1946, Frank Flier and Ferrari did fraudulently and knowingly conceal and facilitate the concealment of a bindle of heroin. Count 40 charges that Bruno, Flier and Ferrari on the 28th day of January, 1946 fraudulently and knowingly did conceal and facilitate the concealment of a bindle of heroin.

In each count the alleged acts of the appellant, Ferrari, are charged to be in violation of the Jones-Miller Act, 21 U.S.C., Section 174, which provides:

> "If any person fraudulently or knowingly imports or brings any narcotic drug into the United States, or any territory under its control or jurisdiction, contrary to law, or assists in doing so or *receives, conceals, buys, sells or in any manner facilitates the transportation, concealment or sale* of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of a narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains the possession to the satisfaction of the jury."

The evidence offered by the government is totally insufficient to establish the offense with which appellant is charged: concealment and facilitation of concealment of heroin. A review of the evidence offered by the government, set forth above in appellant's statement of the case, discloses that upon each of the three days on which a violation is charged, Frank Flier entered the liquor room in which, the agents testified, the bindles were concealed, *then* Ferrari entered that room; Ferrari then inhaled from the bindle and returned the bindle to Flier; Ferrari then left the room, *after which* Flier returned the bindle to the place of concealment. In no case does the evidence

presented by the government disclose that Ferrari ever at any time concealed the bindle of heroin, that the bindle was removed in his presence from the place of concealment, or that Ferrari returned the bindle to the place of concealment, or that the bindle was returned to the place of concealment in his presence. The government's evidence discloses no more than that Ferrari had but a brief and transitory possession of the bindle incident to his making use of the contents.

The defendant Ferrari testified that he was not a user of narcotics, three witnesses testified they had never seen Ferrari use heroin at any time and specifically on January 17 and January 28, 1946, and Ferrari testified and was supported by corroborative evidence that on January 5, 1946, he was in Palm Springs, California.

The authorities make a sharp distinction between possession and concealment. Thus, it is stated by William J. McFadden in "The Law of Prohibition" (Callaghan & Co., 1925), Section 299, at page 316:

> "*'Possess' distinguished from 'conceal'.* Both language and law distinguish between the words 'possess' and 'conceal'. One may possess a thing without concealing it or he may conceal it without possessing it, having parted with possession in the act of concealing it. So also, he may both possess and conceal a thing, but concealment involves an act added to possession and denotes an intention of some sort. One may quite lawfully possess a deadly weapon, but if he carries it concealed he commits a misdemeanor. Implicit in concealment, if innocent, is the element of protection; if not innocent, the element of guilt. We cannot hold

that the possession of liquor, as denounced by the National Prohibition Act in general terms and without regard to whence it came or what is to be done with it, is the same thing or constitutes the same offense as receiving and concealing liquor imported contrary to law. * * *"

Burdick says in "The Law of Crimes" (1946), Volume 3, Section 744, at page 96:

> "To 'conceal', in connection with carrying concealed weapons, is to hide, secrete, screen, cover, and a concealed weapon may be defined, in general, as one which is hidden from the ordinary observation of those who, in the usual association of life, come into contact with the person carrying it. * * *"

Furthermore, the statute itself distinguishes between possession and concealment, and under the statute neither possession nor use is made an offense.

Examination of the record discloses that the trial court proceeded upon the assumption that proof of unexplained possession was alone sufficient to sustain a conviction for violation of U.S.C. Section 174 (R. 85-88). Thus the court states (R. 87):

> "The Court. If you will read the proceedings in connection with the Jones-Miller Act, you will find there why the second part of section 174 was put into the act. The difficulty in detection and enforcement is so great, Congress indicated, this most unusual provision was put into the section: *If you show possession that is sufficient evidence to show a violation of the statute, unless there is a showing to the satisfaction of the jury on the trial of the case, satisfactory explanation as to*

that possession. In other words, a man might possibly have had possession of the narcotic innocently. It is possible. There are conceivable circumstances under which that might well happen. The burden, however, is put upon anyone who is in possession of a narcotic drug to explain the possession. That is the philosophy behind it, and therefore it does not require the niceties of proof that are required for a violation of other statutes. *That is why I would say that it is not necessary for a court to scrutinize the technical nicety as long as possession is shown, in the case of proof under this statute, as it might be under any of the other criminal statutes.* You asked me to more or less state my view in the particular instance you mentioned. That is the way I feel about it. I have never read any decisions to the contrary, but if some higher court wants to construe that statute more narrowly, some other judge might do that. But that is my view. I will deny the motion."

The decisions go no further than to hold, however, that proof of possession of the narcotic drug under the statute raises only the presumption that the narcotic was imported contrary to law and that the defendant had knowledge of such importation. The decisions expressly limit the presumption set forth in the second sentence of U. S. C. Section 174 and make clear that proof of possession is not proof of the act of concealment, sale, transportation, receiving or buying.

Yee Hem v. U. S., 45 S. Ct. 470; 268 U. S. 178, 69 L. Ed. 904;

Gee Woe v. U. S., 250 Fed. 428;
Hooper v. U. S., 16 Fed. (2d) 868 (CCA-9);
Frank v. U. S., 37 Fed. (2d) 77.

In *U. S. v. Steinberg,* 123 Fed. (2d) 425, the court said, at page 427:

> "By force of this section possession of narcotics gives rise to an inference that the narcotics were imported contrary to law, and a further inference that the person in possession had knowledge of such unlawful importation * * * a defendant on trial may overcome these inferences by satisfactory proof that possession of narcotics did not involve a violation of the statute either because the narcotics were not imported contrary to law, or because the accused had no knowledge of unlawful importation. The explanation of possession to serve as a defense must not only be believed by the jury but must also be one that shows a possession lawful under the statute."

Speaking of this limitation as to the inference justified by proof of possession, the court in *U. S. v. One Studebaker Roadster,* 40 Fed. (2d) 557, pointed out, at page 558:

> "* * * the statute is in contravention of common law principles, is penal, and must be strictly construed."

It is well recognized that before proof of one fact in a criminal proceeding may be taken as evidence of proof of another fact which must be proved as an element in the criminal charge, there must be a rational evidentiary relation between the two facts. Wharton

in his "Criminal Evidence" (11th Edition, 1935), Volume 1, page 81, states:

> "* * * The rule is well established that the legislative body may provide by statute or ordinance that certain facts shall be prima facie or presumptive evidence of other facts if there is a natural or rational evidentiary relation between the fact proved and those presumed," citing *Yee Hem v. U. S.* supra.

If the court's construction of the statute to the effect that proof of possession may be, in the absence of explanation, presumptive evidence of concealment, then proof of possession by the same token would give rise to an inference of sale or transportation or purchase. The point need not be labored that there is no natural or rational evidentiary relation between possession and sale or purchase or transportation. Hence, on principle as well as on authority the position taken by the trial judge that proof of possession was presumptive evidence of concealment was erroneous.

Nor is the charge of facilitation of concealment sustained by the evidence presented by the government. To facilitate means "to make easy." At the very least it requires a participation in the act of concealment. Nothing in the government's case as heretofore analyzed indicates that the appellant, Ferrari, participated in the act of concealing. Upon each date the heroin was removed without the participation or assistance of Ferrari from its place of concealment, and returned, without his participation or assistance,

by Frank Flier. Unless the words "facilitation of concealment" are to be construed as meaning "possession" or "use", they do not diminish the burden upon the government, but, as has been noted, the statute fails to make either possession or use an offense. In short, in this case the government has attempted to use the charge of facilitation of concealment as a catch-all to cover acts not made offenses by the statute.

That the position taken by appellant is sound is sustained by an analysis of the authorities. A review of all the cases decided under Section 174 U.S.C., in which the sufficiency of the evidence to sustain a charge of concealment or facilitation of concealment was reviewed by appellate courts, demonstrates clearly that in no case has the government relied upon so slender a base to sustain this charge. In all of the cases charging unlawful concealment in which the conviction was sustained proof was offered of *an overt act in addition to mere possession or use which supported the inference of concealment.*

Thus, in *Gee Woe v. U. S.,* 250 Fed. 428, where the indictment charged receiving and concealing narcotic drugs, knowing them to be imported contrary to law, a conviction was sustained. The evidence disclosed that the defendant answered the knock on his door of the arresting officers, turned off the lights without admitting the officers, and was next seen returning from the backyard next to which were found three tins of the narcotic, an overcoat, and a warm opium pipe. An opium pill was also found on the defendant's person.

In *Camou v. U. S.,* 276 Fed. 120 (CCA-9), where a conviction for concealment was sustained, the evidence disclosed that the defendant had keys to a trunk in which the narcotics were hidden.

The evidence which was held sufficient in *Sam Wong v. U. S.,* 2 Fed. (2d) 969 (CCA-9) to sustain conviction for unlawfully purchasing, concealing and distributing opium disclosed that morphine was found in the bedroom, concealed under fruit boxes below the bunk upon which the defendant slept. In addition, the defendant had admitted paying off his help in the morphine.

In *Foster v. U. S.,* 11 Fed. (2d) 100 (CCA-9), there was an indictment for purchasing, selling, dispensing and distributing. The evidence found sufficient to sustain the conviction consisted of marked bills given to an informer who purchased morphine from the defendant. In addition, when the defendant was arrested, a bindle of morphine was found in his vest pocket; immediately upon arrest he dropped two bindles to the sidewalk and at that time admitted receipt of the marked bills.

In *Rosenberg v. U. S.,* 13 Fed. (2d) 369 (CCA-9), the evidence was held sufficient to show that the defendants were guilty of unlawful purchase, distribution, sale, concealment and facilitation of transportation. The evidence disclosed that the defendant Evans had rented a room in which subsequently was found a valise containing morphine. The inspectors making the arrest knocked on the door of the room, but there was no response for a period of fifteen minutes.

Evans and the defendant Rosenberg came out of the room and started down the stairs and were arrested. Rosenberg had upon his person a package of morphine, and search of the room revealed vials of morphine and a valise, which Rosenberg admitted was his, containing a quantity of the same drug.

In *Hooper v. U. S.,* 16 Fed. (2d) 868 (CCA-9), where the charge was receiving, concealing, buying, selling and facilitating transportation and concealment, the conviction was sustained where the evidence disclosed that the defendant Hooper had offered morphine for sale to an informer.

The defendant was indicted for fraudulently concealing two cans of smoking opium in *Lee Kwong Non v. U. S.,* 20 Fed. (2d) 470. The conviction was sustained upon evidence which disclosed that federal agents, upon smelling opium fumes coming from a laundry, asked the defendant whether opium was being smoked, were told, "No, go search", and upon searching the premises found two cans of opium hidden in a pile of coal behind a partition in the back of the laundry.

A conviction for concealment was sustained in *Frank v. U. S.,* 37 Fed. (2d) 77, where the evidence disclosed that the narcotic was found in the pocket of the defendant and there was evidence of a conspiracy to sell the proscribed drug.

A charge of concealment was held to be sustained by the evidence in *U. S. v. Mule,* 45 Fed. (2d) 132, where the evidence disclosed a sale by the defendant to an informer.

In *Gowling v. U. S.,* 64 Fed. (2d) 796, a conviction for concealing, buying, selling and receiving unlawfully imported narcotics was sustained where the evidence was that the narcotics were found concealed in appellant's vest and in a lemon hull.

In *Borgfeldt v. U. S.,* 67 Fed. (2d) 967 (CCA-9), the defendant was charged with concealment of morphine. It was held there was sufficient evidence to go to the jury where the evidence disclosed that as the defendant got out of his automobile he deliberately dropped two paper bindles into the street.

A conviction for unlawful sale and concealment of narcotics was upheld in *Mullaney v. U. S.,* 82 Fed. (2d) 638. In this case the evidence disclosed that the defendant admitted he owned the drugs which were found in his home, in addition to which marked money was found in his bed.

A conviction for felonious concealment of 45 grains of smoking opium was upheld in *Lee Dip v. U. S.,* 92 Fed. (2d) 802 (CCA-9). In this case defendant's partner was arrested coming into defendant's home and at that time attempted to rid himself of narcotics which he had in his pockets. A search of the premises revealed the opium concealed in jars in the bathroom of defendant's living quarters.

The case of *Pon Wing Quon v. U. S.,* 111 Fed. (2d) 751 (CCA-9), is one in which the evidence clearly indicated a concealment. Here the defendant was indicted for importing, facilitating the transportation, concealing and facilitating the concealment of opium. The defendant was an expressman, and the evidence

disclosed that when he learned of the presence of agents he backed up to a trunk containing narcotics and surreptitiously placed a sticker on it. The sticker was a customs label which would have precluded further examination of the trunk.

In *U. S. v. Cohen,* 124 Fed. (2d) 164, a conviction for concealing and transporting morphine was sustained where the evidence disclosed both manufacture and sale.

Evidence was held sufficient to sustain a conviction of "assisting in the concealment of smoking opium" in *Wong Chin Pung v. U. S.,* 142 Fed. (2d) 57 (CCA-9). In this case the evidence disclosed that the defendant was apprehended in an opium smoking den in which opium was concealed in a woodpile and that the defendant had "operated the two doors by which the opium was made difficult of access and concealed from the authorities."

In *Brady v. U. S.,* 148 Fed. (2d) 394 (CCA-9), the evidence was held sufficient to sustain a conviction of appellant and his wife for receiving, concealing and transporting heroin where immediately prior to the arrest of defendant's wife the defendant threw the package containing the narcotics onto the floor of a public garage.

In *U. S. v. Li Fat Tong,* 152 Fed. (2d) 650, evidence that the defendant concealed twenty tins of smoking opium in his baggage in a shoe box was held sufficient to sustain a conviction on a charge of concealment and transportation.

In summary, then, in no reported case in which the sufficiency of the evidence to sustain a conviction for concealment or facilitation of concealment has been considered upon appeal has the government failed to offer proof of some overt act in addition to possession or use. The absence of a decision in which less evidence was offered is persuasive evidence that hitherto, at least, the government has agreed with the position taken by appellant in this case that proof of possession or use alone is insufficient to justify a prosecution for concealment.

POINT 2. THERE IS A FATAL VARIANCE BETWEEN THE CHARGE IN COUNT ONE OF THE INDICTMENT AND THE EVIDENCE.

Count One of the indictment charges that Vincent Bruno and Renaldo Ferrari on the 5th day of January, 1946, fraudulently concealed and facilitated the concealment of one bindle of heroin. The government offered evidence that on that date not Vincent Bruno but Frank Flier removed the bindle from its place of concealment and returned it after Ferrari had used the contents (R. 62-77). To charge that Bruno and Ferrari concealed the heroin and to introduce evidence that Flier and Ferrari commited the act charged is a material variance.

Wharton on "Criminal Evidence" (11th Edition, 1935), says, at page 1802:

> "The rule now accepted by all courts is that a variance in criminal law is not now regarded as material unless it is of such a substantive char-

> acter as to mislead the accused in preparing his defense, or is likely to place him in a second jeopardy for the same offense. Hence, the tests of a fatal variance are: was defendant misled in preparing his defense? Will defendant be protected against a future proceeding involving the same charge? * * *"

In support of the rule Wharton cites *Gilbeau v. U. S.*, 288 Fed. 731, wherein the court stated, at page 732:

> "If the rule against a material variance be considered technical, yet it is sound, because it is based upon the constitutional guarantee that an accused should be informed of the nature and cause of the accusation against him, and only by adhering to it can the danger of misleading a defendant be avoided."

As Mr. MacInnis pointed out to the trial court (R. 80-81), in this case, where sixteen defendants in addition to Ferrari were charged with narcotics violations (R. 2), Ferrari would be and in fact was misled in preparing his case where the charge was concealment on a given date with a specified defendant and the evidence which the government offered was that Ferrari committed the offense with another of the sixteen defendants named in the indictment.

POINT 3. THE APPELLANT WAS DENIED A FAIR TRIAL.

The appellant was tried on the three counts of the indictment previously noted on April 23 and 24, 1947.

On April 22, 1947, the Honorable Louis E. Goodman, who presided at the trial of the appellant, had heard evidence, in proceedings supplemental to a plea of guilty entered by Frank Flier, concerning Ferrari. The evidence regarding Ferrari was of the most prejudicial character, for the agent who testified in the Flier proceedings stated that Ferrari was a known narcotic violator (Sup. R., page 172) and also testified to evidence of an even more serious character, so far as Ferrari was concerned, by stating that Flier, Bruno and Ferrari had divided up money from the sale of norcotics (Sup. R. 181, 183).

When this evidence was offered, Ferrari's counsel, Mr. MacInnis, was not present, and so was denied the right of cross-examination. The very next day the same court tried the appellant in the case which is now on appeal. Mr. MacInnis was at the time unaware that the trial judge had heard this evidence concerning Ferrari, and consequently was unable to take proceedings for his disqualification, or to urge this ground upon the motions for a new trial and in arrest of judgment.

It is submitted that the evidence that the trial court received concerning Ferrari was almost certain to prejudice him against appellant in appellant's trial. It is submitted that it was the reception of this evidence, to which no counter testimony was ever offered and concerning which no cross-examination was had, which accounts for the trial court's readiness to convict appellant upon so slender a thread of evidence.

CONCLUSION.

The foregoing arguments should demonstrate that the judgment against the appellant, Ferrari, should be reversed. The errors committed were fundamental and prejudicial. Not only so, but to permit the conviction to stand upon the evidence presented would be in practical effect to amend U.S.C. Section 174 by judicial construction in a manner wholly beyond the intention of Congress.

Dated, San Francisco, California,
February 16, 1948.

Respectfully submitted,
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